

STATE OF MONTANA

IBLA 84-843

Decided September 27, 1985

Appeal from a decision of the Montana State Office, Bureau of Land Management, dismissing protest to assertion of rights on behalf of the United States in the lakebed of McGregor's Lake, Montana.

Set aside; referred for hearing.

1. Navigable Waters

A lake is navigable in fact when it is used, or is susceptible of being used, in its ordinary condition, as a highway for commerce, over which trade and travel are or may be conducted. Whether a lake in Montana is navigable for purposes of determining title to the lakebed depends upon whether there is evidence to show the lake had been used or was susceptible of being used as a highway for commerce at the time Statehood was conferred upon Montana in 1889.

APPEARANCES: Lyle Manley, Esq., Department of State Lands, State of Montana; David A. Provinse, pro se.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

The State of Montana, Department of State Lands, has appealed from a July 19, 1984, decision of the Montana State Office, Bureau of Land Management (BLM), dismissing its protest of BLM's assertion of rights on behalf of the United States in the lakebed of McGregor's Lake (T. 26 N., Rs. 25 and 26 W., Principal Meridian, Montana).

The origin of this controversy is a noncompetitive oil and gas lease offer, M 55900, submitted by David A. Provinse on July 21, 1982, for approximately 691.5 acres of land. The described lands constitute part of the lakebed of McGregor's Lake and certain lands riparian to the lake. 1/

1/ The offer was rejected in part by BLM decision dated July 5, 1983, because it described lands within oil and gas lease M 50913 (effective Apr. 1, 1983), and lands where the oil and gas rights are not owned by the United States. Provinse's revised lease offer is for the following lands: T. 16 N., R. 25 W., Principal Meridian, sec. 6: lot 10; sec. 6: The bed of McGregor's Lake riparian to Lot 10 identified in the offer as tract 2; sec. 8: The bed of McGregor's Lake riparian to lots 1 and 2 identified as tract 3; sec. 16: The bed of McGregor's Lake riparian to lots 1, 2, 3, and 4 identified as tract 4; T. 26 N., R. 26 W., Principal Meridian, sec. 12: The bed of McGregor's Lake riparian to lots 1, 2, 3, and 4 identified as tract 1.

On June 19, 1984, BLM sent a notice to the State of Montana declaring "that the United States asserts its rights to the mineral interest in the lakebed" and offering the State 30 days to assert a conflicting claim. In this notice, BLM referred to the fact the State of Montana had used the deficiency acreage in sec. 16, T. 26 N., R. 25 W., Principal Meridian, as a base for an indemnity lands selection in 1922. ^{2/} Citing David A. Provinse, 15 IBLA 387, 81 I.D. 300 (1974), BLM stated "the acceptance by a state of other lands in lieu of lands lying within the meander line of a nonnavigable body of water adjacent to the granted upland school section was a relinquishment of an interest in the land underlying the water and precludes assertion of a state claim to such land."

In a June 28, 1984, response to BLM's notice, the State introduced a claim that McGregor's Lake, about 5 miles long and one-half mile wide, located between Kalispel and Libby, Montana, is navigable for title purposes and asserted that, as a result, it "[owned] the bed between the low water markers of the land and any minerals associated therewith." BLM in its July 19, 1984, decision rejected the State's claim based on the opinion of the Branch of Cadastral Survey, Montana State Office, BLM, that "McGregor's Lake is a nonnavigable body of water because the remoteness of the lake would tend to negate any useful commerce crossing this small lake." The indemnity lands selection was also cited in the decision as grounds for rejecting the claim. ^{3/}

In its statement of reasons, the State of Montana relates a short summary of the law of navigability for title purposes and asserts that the rule is determined by proof of "susceptibility for commerce, navigation and fishery." The State claims McGregor's Lake is "not too small for navigational purposes," but that present use of boats on the lake for recreation and sport fishing demonstrates the lake's capability for commercial navigation. It also discusses the use of a nearby lake similar in size for floating timber in conjunction with a sawmill operation. The inference is drawn that McGregor's Lake is likewise useful for logging purposes, although no such use is shown.

Provinse, the oil and gas lease offeror, filed an answer in which he argues that the rule of navigability for title purposes focuses on whether the

^{2/} BLM's notice referred only to sec. 16, T. 26 N., R. 25 W., Principal Meridian. This section was granted to the State of Montana upon its admission to the Union for support of its public schools. Act of Feb. 22, 1889, sec. 10, 25 Stat. 676, 679. When the area was surveyed, the lake was meandered and the section was platted as fractional. Pursuant to the Act of Feb. 28, 1891, as amended, 43 U.S.C. §§ 851, 852 (1982), the State selected and was granted 73.95 acres of other lands in lieu of the lands which, if fast land, would have been in sec. 16 but instead constitute the bed of McGregor's Lake.

^{3/} In David A. Provinse, 15 IBLA 387, 81 I.D. 300 (1974), lands to which the State asserted title were claimed by the State as the riparian owner of the upland adjacent to a nonnavigable lake. Navigability was not an issue in that case. This fact is overlooked by BLM, and this oversight is apparently the basis for the arguments here raised that a relinquishment occurred. This argument is misplaced in the context of this case.

channel of the water body in question is capable of being part of a "highway of commerce." He asserts the evidence shows the lake is too small and too remote to support useful commerce.

[1] The Secretary of the Interior has both the authority and the duty to consider and determine what lands are public lands of the United States. See State of Montana, 11 IBLA 3, 80 I.D. 312 (1973). Such authority and duty include a determination of navigability of a lake to ascertain whether title to the land underlying the lake remains in the United States or whether title passed to a state upon its admission into the Union. Id. The first of two principles relevant here is that the bed of a nonnavigable lake is usually deemed to be the property of the adjoining landowners. 12 Am. Jur. 2d, Boundaries § 15 (1964). The second principle is that, under the "equal footing doctrine," title to land beneath navigable waters passed to the State upon its admission into the Union. Montana v. United States, 450 U.S. 544, 551 (1981). Thus, ownership of the lakebed turns on whether or not the lake is deemed navigable. The rule of navigability established by the Supreme Court for cases such as this was aptly summarized in State of North Dakota ex rel. Board of University and School Lands v. Andrus, 671 F.2d 271, 277 (9th Cir. 1982):

The legal standards on navigability have developed over a long line of cases. In The Daniel Ball, 77 U.S. (10 Wall.) 557, 563, 19 L.Ed. 999 (1870), the Supreme Court set forth what has become the basic standard:

Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

In The Montello, 87 U.S. (20 Wall.) 430, 441, 22 L.Ed. 391 (1874), the Court elaborated, stating that "the true test of the navigability of a stream does not depend on the mode by which commerce is, or may be, conducted, nor on the difficulties attending navigation. "The Court also stated that "[i]t would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway." Id. The Court cautioned, however, that:

It is not . . . "every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable, but, in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture." Id. at 442.

The focus on commerce does not require that the waterway be clear of obstructions or easily traveled throughout the

entire year. As the Court said in Economy Light & Power Co. v. United States, 256 U.S. 113, 122, 41 S.Ct. 409, 412, 65 L.Ed. 847 (1921), "[n]avigability, in the sense of the law, is not destroyed because the watercourse is interrupted by occasionally natural obstructions or portages; nor need the navigation be open at all seasons of the year, or at all stages of the water." In Utah v. United States, 403 U.S. 9, 10, 12, 91 S.Ct. 1775, 1775, 1776, 29 L.Ed.2d 279 (1971), a case concerned with the claim of the State of Utah to the bed of the Great Salt Lake under the equal footing doctrine, the Supreme Court cited the above quoted passage from The Daniel Ball and upon review of the facts concluded that the lake was navigable. As the Court said, "[t]he lake was used as a highway and that is the gist of the federal test." 403 U.S. at 11.

Although The Daniel Ball was an admiralty case, the Supreme Court has since applied the Daniel Ball rule in cases where title to land depended upon a navigability determination. United States v. Oregon, 295 U.S. 1 (1935). As observed in State of Alaska v. United States, 754 F.2d 851 (9th Cir. 1985), "the crux of the [Daniel Ball] test is still the requirement that the body of water be susceptible of use as a highway or channel for commerce on water." Id. at 854.

The court in State of Alaska, supra, observes, citing United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940), that because the concept of navigability is flexible, each application of the Daniel Ball test is, "apt to uncover variations and refinements which require further elaboration." The distinction drawn by the State of Alaska court is instructive; the fact of usage alone is not enough to make a body of water navigable. The use must be purposive. The navigability question is ultimately a question of fact, the resolution of which may be facilitated by reference to other adjudications involving similar waterways. Further, the lake must, at the time of statehood, have been used or been susceptible to commercial use in its natural condition without modification of the lakebed. United States v. Utah, 183 U.S. 64 (1931). The treatment of other lakes similarly situated in Montana may provide clues to a proper characterization of McGregor's lake.

The Board has previously ruled that a meandered lake in Montana is nonnavigable where it is located in a remote region and there is no evidence to show it has been used or is susceptible to be used as a highway for commerce. State of Montana, supra. In formulating this conclusion, the Board made the following observation of other cases:

In United States v. Oregon, 295 U.S. 1 (1935), the Supreme Court held five bodies of water in Oregon to be nonnavigable, even though some 10,800 acres of one of the lakes were between 3 and 4 feet deep and in spite of evidence of some actual use of the lakes for boating. In John Snyder, State of Montana, 71 I.D. 527 (1965), this Department determined that a shallow lake in Montana approximately a mile long and a half-mile wide did not meet the test of a navigable body of water set forth by the Supreme Court. The Department has also held that an inland lake, two miles long and three-fourths of a mile wide, is not navigable

in the sense that its waters can be put to a public use for the purpose of trade or commerce. Reuben Richardson, [11 C.L.O. 284 (1883) as summarized at] 3 L.D. 201 (188[4]).

Id. at 11-12, 80 I.D. at 316.

Appellant has presented no evidence of commercial use of McGregor's Lake. Rather, the record now indicates that, historically, travel on land around the lake has been the preferred course for transporting people or goods through the area. The lake itself does not connect with any navigable streams or rivers as part of a waterway system. Cf. United States v. Holt State Bank, 270 U.S. 49 (1926).

Appellant refers to the use of boats on the lake for pleasure purposes. However, mere pleasure boating or fishing does not constitute commerce for navigability purposes. United States v. Oregon, supra; George v. Beavark, Inc., 402 F.2d 977 (9th Cir. 1968). This remains true although the significance of this sort of usage may have some application in Montana law for other purposes not here relevant. See e.g., Montana Coalition for Stream Access, Inc. v. Curran, 682 P.2d 163 (1984) and Montana Coalition for Stream Access, Inc. v. Hildreth, 684 P.2d 1088 (1984), holding recreational use a relevant consideration in determining rights of public user, as distinguished from questions of navigability. A stream which could in no way be considered navigable may be an important cutthroat trout habitat and thus be important for recreational fishing.

The lake's characteristics and uses at statehood are only briefly described by the record on appeal. The State objects to the determination proposed by BLM, contending McGregor's Lake is similar to another nearby lake which was earlier used for logging and, therefore, arguably was navigable in 1889. ^{4/} Also, the State has moved the Board to order a hearing to permit production of evidence concerning navigability of McGregor's Lake. However, the State has yet to submit evidence showing there is or was commercial use of McGregor's Lake. Under these circumstances a hearing is customarily ordered. Solicitor's Opinion, M-36596 (Mar. 15, 1960). The State of Montana is entitled to produce evidence to show McGregor's Lake was used or susceptible of being used as a highway for commerce at the time of Montana's statehood in 1889.

Several recent Montana cases dealing with questions of water access as a consideration affecting public use within the state, point out that navigability adjudications of the sort now required have no direct application at the state level. See, e.g., Montana Coalition for Stream Access, Inc. v. Curran, supra, where the right of the public to use the waters of the state for recreation is announced by the court. In landlocked states such as Montana, the reasons which underlie the common law's development of theories of navigability which involve the right of the sovereign to claim to

^{4/} See discussion of the use of a waterway for logging as affecting navigability found in State of Oregon v. Riverfront Protection Ass'n, 672 F.2d 792, 795 (9th Cir. 1982).

the high-water mark, seem arcane at best. Nonetheless, a navigability inquiry using the Daniel Ball standard must be made here to determine whether the State owns the bed to the lake; if the lake was not navigable in 1889, as Provinse contends, the result is that title to the portion of the lakebed claimed by him rests in the Federal Government. A lease of the claimed underwater lands may then issue to him, all other requirements for leasing having been met. See, e.g., State of Oregon v. Riverfront Protection Association, 672 F.2d 792 (9th Cir. 1982) for a discussion of the application of the Federal navigation rule to land title determination cases. ^{5/}

Accordingly, this appeal is referred to the Hearings Division for appointment of an Administrative Law Judge who will conduct a hearing concerning navigability of McGregor's Lake. The State of Montana, David A. Provinse and BLM shall be notified of the hearing and permitted to participate as parties. Evidence shall be reviewed concerning the navigability of McGregor's Lake in 1889, on the date of Montana statehood. Recreational or sports use is not a consideration in such a determination, nor are considerations of state law (such as are discussed in the two Montana Coalition for Stream Access, Inc. decisions, cited above) material to a resolution of the issue here. Modern theories of sport or recreational use which limit or reject traditional standards for determining navigability have no application at this hearing, which is wholly controlled and determined by Federal law. See State of Oregon v. Riverfront Protection Association, *supra*. The inquiry will consider whether the lake was navigable or susceptible to navigation in its natural state without need for modification of the waterway. Evidence of actual historical commercial use, of susceptibility of the lake to such use, and of trade and commercial patterns in the vicinity are relevant to the inquiry to be conducted.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case is referred to the Hearings Division. The Administrative Law Judge shall enter findings of fact, conclusions of law and a decision based upon the record made at hearing. Unless a timely appeal is taken from the Administrative Law Judge's decision, it shall constitute the final decision for the Department in this matter.

Franklin D. Arness
Administrative Judge

We concur:

Gail M. Frazier R. W. Mullen
Administrative Judge

Administrative Judge

^{5/} Navigability determinations for purposes of determining title to waterways differ from navigability determinations for other purposes, as explained, *Id.* at 672 F.2d 794, n.1.

